The Litigation Section
of The State Bar of California

CALIFORNIA LITIGATION:

Featured Article, Volume 12, Number 2, 1999

Don't Lose Your Appeal at Trial

By Gregory R. Ellis and Gerald Clausen

While it has been said that the best way to win a case on appeal is to win at trial, it is also true that many cases lost in the trial court would have a better chance of success on appeal if potentially meritorious issues had been preserved. It is not uncommon that we, as appellate counsel, find ourselves unable to make otherwise valid arguments on appeal because they have been inadvertently waived in the court below. This article identifies some likely sources of such waivers, situations which may require action by counsel to preserve an issue — or, indeed, an entire case — for subsequent appellate review.

Determine whether your client's only actual (or only effective) appellate remedy is a petition for extraordinary writ.

Sometimes, your only actual, or at least your only effective, avenue of appellate review will not be an appeal at all, but rather a petition for extraordinary writ relief. For example, a statute might expressly limit appellate review to a petition for writ; other times; courts will have interpreted an applicable writ statute as being exclusive, even though the actual statutory language is only permissive. (*See, e.g*., Code Civ. Proc., § 170.3, subd. (d) [ruling on motion to disqualify a judge]; Gov. Code, § 6259c [grant or denial of a motion for disclosure of public records under the Public Records Act]; Code Civ. Proc., § 405.39 [order granting or refusing to grant the expungement of a lis pendens]; Code Civ. Proc., § 877.6(e) [motion for good faith settlement]; *Housing Group v. Superior Court* (1994) 24 Cal.App.4th 549, 552 [same]; C*ounty of Los Angeles v. Guerrero* (1989) 209 Cal.App.3d 1149, 1152, fn. 2.)

Be alert that these so-called "statutory writ" provisions can contain their own specific filing deadlines. (*See, e.g*. Code Civ. Proc., § 405.39 [within 20 days after service of written notice of order]; Code Civ. Proc., § 170.3(d) [within 10 days of notice to the parties of the decision].) The time limit may be jurisdictional. (*See People v. Superior Court* (Brent) (1992) 2 Cal.App.4th 675.)

A petition for extraordinary writ relief may also be the sole effective appellate remedy where the failure to seek such interlocutory review may result in a finding that the error has been waived. (*See* Code Civ. Proc., § 418.10 [motion to quash service of process for lack of personal jurisdiction]; *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 258 [same].)

In addition, review by writ may be the only realistic avenue of appellate review from pre-trial rulings where prejudice warranting reversal would be difficult if not impossible to show after a full trial on the merits. (*See, e.g., Waller v. TJD, Inc*. (1993) 12 Cal.App. 4th 830 [denial of summary judgment on merits held harmless where subsequent trial resulted in verdict against moving party]; but compare *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1090 [denial of summary judgment on purely legal ground (statute of limitations) not harmless despite subsequent jury verdict against moving party]; *see also, e.g., Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195-96 [pre-trial motion to dismiss]; and compare *Oskooi v. Fountain Valley Regional Hospital and Medical Center* (1996) 42 Cal.App.4th 233, 237-38, fn. 4.)

Finally, by definition, writ relief will likely be the only effective appellate remedy where waiting to appeal from a subsequent judgment would result in irreparable injury to the aggrieved party. (*See* Code Civ. Proc., §§ 1068, 1086, 1103.)

Make sure you follow the procedural requirements for summary judgment and adjudication.

Be particularly cognizant of what has been dubbed the “Golden Rule of Summary Adjudication:” if a fact is not set forth in the separate statement of undisputed material facts (or the response thereto), it does not exist. (*See, e.g., North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 30-31; *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337; *Blackman v. Burrows* (1987) 193 Cal.App.3d 889, 894-895.) This is true even though the material fact in question has been recited in a party’s points and authorities or supporting evidence.

At least in some circumstances an objection to the inadequacy of the opposing party‘s separate statement may be necessary to preserve the issue for appeal. (*See, e.g., F & R Brokerage, Inc., v. Superior Court* (1995) 35 Cal.App.4th 69, 71-72, n.2; *Coy v. County of Los Angeles, supra,* 235 Cal.App. 3d at pp. 1084-1085, fn. 4.) In this same vein, evidentiary objections not actually raised at or before the hearing on the motion are waived. Moreover, to later challenge an evidentiary ruling on appeal, you must have actually obtained a ruling on the issue from the trial court. (*See, e.g., Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn.1.)

Finally, remember that a summary judgment (as distinguished from the order granting the motion) is an appealable *judgment* (see discussion, *infra*), even where it is granted as to only one party in a multi-party case. (*See* Code Civ. Proc., §§ 437c, subd. (l), 904.1, subd. (a); *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 821, fn. 3, disapproved on another point in *Della Penna v. Toyota Motor Sales U.S.A., Inc*. (1995) 11 Cal.4th 376, 393, n.5; *Aguilar v. Universal City Studios, Inc*. (1985) 174 Cal.App.3d 384, 387, fn. 1.) In contrast, other rulings under section 437c (for example, the denial of summary judgment) are not appealable before final judgment, although review by writ may be sought. (*Coy v. County of Los Angeles, supra*, 235 Cal.App.3d at p. 1082, fn. 2.)

Preserve your evidentiary issues.

If the Court of Appeal cannot determine the content or effect of evidence you claim was erroneously excluded at trial, it cannot assess whether reversible error occurred. Make sure you make your record by offering proof as to what the disputed evidence would have shown. Then, on appeal, you will be able to cite the offer of proof to establish both error and prejudice. (*See* Evid. Code, § 354; *People v. Ramos* (1997) 15 Cal.4th 1133, 1177-1178; *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1176-1177 [offer deficient]; *In re Mark C*. (1992) 7 Cal.App.4th 433, 444.) You will also be able to confirm that the trial court was provided an informed opportunity to consider the admissibility of the evidence. Be sure when you make an offer of proof that you obtain a ruling from the court — on the record — which squarely responds to your request.

The same considerations govern a claim that the trial court erroneously admitted your opponent’s evidence. The failure to object to such evidence on *specific grounds* can constitute a waiver of your right to challenge its admissibility on appeal. (*See* Evid. Code, § 353, subd. (a); *People v. Ramos, supra*, 15 Cal.4th at p. 1171; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1022 [objection on wrong ground].)

Be sure to offer all trial exhibits into evidence, and obtain specific rulings admitting or excluding each exhibit. Also — and this will become particularly important if you lose at trial — make sure the integrity of the exhibits will be maintained pending appeal, either by ensuring they are retained by the court clerk, or, should the court order the exhibits returned to the parties, by reaching an agreement with opposing counsel for their safekeeping and subsequent transmittal to the Court of Appeal.

Preserve objections to jury instructions.

Code of Civil Procedure section 647 provides that jury instructions are “deemed excepted to.” (*See Mock v. Michigan Mutual Ins. Co*. (1992) 4 Cal.App.4th 306, 333-334.) Section 647 does not preserve the issue on appeal, however, if (1) you requested the same or a similar instruction (see *Fortman v. Hemco, Inc*. (1989) 211 Cal. App.3d 241, 255) or (2) the instruction is correct as a matter of law, but incomplete, and you did not offer clarifying language (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-949). If you agree on the record that all objections to jury instructions have been made, specify that you are nonetheless reserving your statutory objection under section 647. Finally, if possible, have a court reporter present at all proceedings on jury instructions, whether conducted in chambers or open court.

If you are the losing party in a court trial, request a statement of decision, and object to any deficiencies it contains.

A statement of decision after a court trial is required only upon the request of a party, and only upon controverted issues specified by a party. (Code Civ. Proc., §§ 632, 634; *see also* Cal. Rules of Court, rule 232 (b) [procedure].) The failure to request a statement of decision after court trial, or to object to a defective one, can affect the *scope of review* on appeal. Generally, on appeal, there is a presumption in favor of the judgment. As applied to statements of decision, this presumption means that an appellate court will ordinarily presume the trial judge decided in favor of the prevailing party as to all facts and issues in the case. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *People v. Duz-Mor Diagnostic Laboratory, Inc*. (1998) 68 Cal.App.4th 654, 665.) Under Code of Civil Procedure section 634, however, the presumption does not apply to a defect in a statement of decision *if* that defect was called to the attention of the trial judge. Consequently, a litigant who fails to bring deficiencies in a statement of decision to the trial court's attention waives the right to complain of such errors on appeal, thereby allowing the appellate court to make implied findings in favor of the prevailing party. (*Id*. at p. 1132-1134.)

(This does not apply to legal errors appearing on the face of the statement of decision, however. (*United Services Auto. Assn. v. Dalrymple* (1991) 232 Cal.App.3d 182, 186.))

Move for a new trial if you plan to challenge the amount of damages.

If you anticipate challenging the amount of damages — that is, that damages are either excessive or inadequate — you must first do so by way of new trial motion. (*See, e.g., Christiansen v. Roddy* (1986) 186 Cal.App. 3d 780, 789; *Glendale Federal Savings & Loan Ass'n v. Marina View Heights Development Co*. (1977) 66 Cal.App.3d 101, 122.) Also, if you intend to argue jury misconduct which can only be exposed by juror affidavits, submitting such affidavits with a motion for new trial will make them part of the record on appeal.

Determine whether your ruling is appealable.

Failure to appeal from an appealable ruling results in a loss of the right to appeal. (*See, e.g*., Code Civ. Proc., § 906; *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966, fn. 3; *see also, e.g., Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc*. (1997) 15 Cal.4th 51, 56.) Conversely, an appellate court has no jurisdiction to consider an appeal from a ruling that is *not* appealable. (*Efron v. Kalmanovitz* (1960) 185 Cal.App.2d 149, 152.) Accordingly, if you appeal from a non-appealable order (for example, an order sustaining a demurrer rather than the subsequent judgment of dismissal), you run the risk not only that your appeal will be dismissed, but also that you won't be alerted to your error until it is too late to appeal from the judgment that actually *was* appealable.

Whether a ruling is appealable is determined by statute. (*Lavine v. Jessup* (1957) 48 Cal.2d 611, 613.) Code of Civil Procedure section 904.1 is the main provision authorizing appeal. Other statutes, however, may make specific rulings appealable. (*See, e.g*., Fam. Code, § 2025; Prob. Code, §§ 2750, 3024).

There are basically three types of trial court rulings: final judgments, interlocutory judgments, and orders. Final judgments are made appealable by Code of Civil Procedure section 904.1, subdivision (a). A final judgment is, in general, one that finally and completely adjudicates all of the rights of all the parties to the action, leaving nothing further to be done in the way of judicial action. (*E.g., Kinoshita v. Horio, supr*a, 186 Cal.App.3d at pp. 962-963.) An interlocutory judgment, on the other hand, is one that determines some, but not all, of the rights of the parties to the litigation (*e.g.*, the determination of only one issue in a bifurcated trial).

Not only are final judgments appealable, but under what is known as the "one-final-judgment" rule, an appeal generally can be taken *only* from the final judgment and not from an interlocutory judgment or order. (Code Civ. Proc., § 904.1, subd. (a)(1); *Kinoshita v. Horio, supra*, 186 Cal.App.3d at pp. 962-963.) There are, however, exceptions to this rule. For example, three types of interlocutory judgments are expressly made appealable by Code of Civil Procedure section 904.1, subdivision (a) (8), (9), (11). Also, although orders generally are not appealable, certain orders are expressly made appealable by statute. (*See, e.g*., Code Civ.

Proc., § 904.1, subd. (a).) (In addition, some orders are specifically reviewable only by writ petition. *See* discussion, *supra*.)

Another exception to the one-final-judgment rule is a *severable*, partial adjudication that either disposes of a *collateral matter* (*Efron v. Kalmanovitz, supra*, 185 Cal.App. 2d 149, 154-155; *see Steen v. Fremont Cemetery Corp*. (1992) 9 Cal.App.4th 1221, 1227-1228) or disposes of all issues as to one party (*Justus v. Atchinson* (1977) 19 Cal.3d 564, 567-568, overruled on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159.) Determining whether a ruling is a severable, partial adjudication is critical because, as discussed above, the failure to take an appeal from such an appealable ruling will generally result in loss of the right either to appeal it or have it reviewed on a subsequent appeal from the final judgment.

One final caveat — be sure that a ruling really is what it claims to be. It is the *effect* of the ruling, and not the name given to it, that determines whether it is appealable. (*Kinoshita v. Horio, supra*, 186 Cal.App.3d at pp. 962-963.) Consequently, what is designated an order or an interlocutory judgment may in reality be a misnamed final judgment or severable, partial adjudication, each of which would be appealable.

— Conclusion —

A trial attorney's main job, of course, is to win his or her case at trial, not facilitate an appeal. Trial counsel, operating on the "front line" of litigation, may therefore decide to forego record-making in certain situations in order to increase the odds of victory in the first instance — for example, where counsel concludes that raising an objection is outweighed by the likelihood it would alienate the judge or jury or unduly emphasize the objectionable matter. These are tactical decisions properly left to the trial attorney's discretion. The purpose of this article is simply to help ensure that any such decisions are made with an awareness of their potential ramifications on appeal.

Gregory R. Ellis is with the law offices of Wolff & Ellis, a San Francisco appellate firm. Gerald Clausen is "of counsel" to the firm. The authors have presented expanded versions of this material at the State Bar of California's annual convention.

California Litigation is pleased to review original articles submitted for publication.
(Articles should be 8-10 double-spaced pages, or about 2,000 words.)

Please submit proposed articles to:

Russell Leibson
Editor-in-Chief, California Litigation
Law Offices of Russell Leibson
One Market Plaza
Steuart Street Tower, Suite 1600
San Francisco, CA 94105-1016

The journal is sent free to members of the Litigation Section.

The Litigation Section
State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639